

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SAMUEL KATZ, an individual, on his)	
own behalf and on behalf of all others)	Case No.
similarly situated,)	18-cv-10506-ADB
)	
Plaintiff,)	
)	
LIBERTY POWER CORP., LLC, <i>et al.</i> ,)	
)	
Defendants.)	

MOTION OF THE UNITED STATES OF
AMERICA TO EXTEND THE DEADLINE TO
DECIDE WHETHER TO INTERVENE
(ASSENTED TO)

The United States of America, through its attorney, Andrew E. Lelling, United States Attorney for the District of Massachusetts, respectfully moves the Court for an extension of time to decide whether to intervene to defend the constitutionality of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227. The grounds for this motion are as follows:

1. On August 6, 2018, Defendants Liberty Power Corp., LLC and Liberty Power Holdings, LLC (“Defendants”) filed a Notice of Constitutional Question (“Notice”), pursuant to Rule 5.1 of the Federal Rules of Civil Procedure and 28 U.S.C. § 2403(a). ECF No. 59. The Notice advised the United States that Defendants had filed a Motion to Dismiss Plaintiff’s First Amended Complaint and Memorandum in Support thereof (ECF Nos. 55, 56). The Notice advised the United States that the Defendants had taken the position that the Telephone Consumer Protection Act (“TCPA”) was unconstitutional. Defendants stated: “47 U.S.C. § 227(b)(1)(A)(iii) expressly contains content-based restrictions that violate both the First Amendment to the United States Constitution (“Constitution”) and the Equal Protection Clause

of the 14th Amendment to the Constitution.” ECF No. 59 at 1. This Court has not yet certified the constitutional question, as required by Rule 5.1(c) and 28 U.S.C. § 2403.

2. Rule 5.1 provides that, unless the court sets a later date, the United States may intervene within 60 days after the notice. In this case, given that the Notice was filed on August 6, 2018, the United States’ current deadline to intervene to defend the constitutionality of the TCPA is October 5, 2018.

3. Counsel for the United States requests more time because the United States has not yet decided whether to intervene in this action to defend the constitutionality of § 277(b)(1)(A)(iii). The approval of the Solicitor General is required for it to intervene in order to defend the constitutionality of a federal statute. *See* 28 C.F.R. § 0.21. The process of obtaining a decision from the Solicitor General generally takes at least several weeks, and sometimes longer. The Notice only recently came to the attention of the undersigned, who is responsible, with other divisions within U.S. Department of Justice, for recommending whether intervention is warranted. Consequently, additional time is needed.

4. Further, Plaintiffs have represented to the Court that they intend to file an Amended Complaint and that they do not anticipate that the Defendants will stipulate to such filing. *See* ECF No. 77, p. 2, Plaintiffs’ Unopposed Motion for Extension of Time. Should the Court nonetheless authorize the filing of the Amended Complaint, and should a motion to dismiss be thereafter filed, Defendants are required to file and serve a new 5.1 Notice, if their motion again raises the present – or any other – constitutional challenge to the TCPA. This new Rule 5.1 Notice would trigger a new 60-day window in which the United States may decide whether to intervene, thus obviating the need for the U.S. Department of Justice to make a

decision on the current Notice (and superseding any deadline the Court might set in response to this extension motion).

5. Finally, both counsel for Plaintiffs and Defendants have consented to this Motion.

WHEREFORE, based upon the foregoing, the United States requests that the Court grant its Motion, and Order that the United States intervene on or before November 19, 2018.

Respectfully submitted,

ANDREW E. LELLING
United States Attorney

By: /s/ Susan M. Poswistilo
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CERTIFICATE OF SERVICE

I hereby certify that this documents filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF)

Dated: October 5, 2018

/s/ Susan M. Poswistilo
Susan M. Poswistilo
Assistant United States Attorney

CERTIFICATION

I certify that I have conferred with opposing counsel by email and have attempted in good faith to resolve or narrow the issue.

/s/ Susan M. Poswistilo
Susan M. Poswistilo
Assistant United States Attorney

Date: October 5, 2018